IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 136
ARC 53/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RAINBOW FALLS ORGANIC FARM LIMITED Plaintiff
AND	ALAN ROCKELL Defendant

Hearing: 24-26 March and 16 May 2014
(Heard at Kaikohe (24-26 March) and Whangarei (16 May))

R Mark, counsel for plaintiff
B Quarrie, counsel for defendant

Judgment: 29 July 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Alan Rockell was employed as a farm manager on the defendant's farm in November 2006. This followed discussions with the company's director, Mr McKenzie. The relationship came to an end in May 2011 when Mr Rockell was dismissed. He subsequently pursued a personal grievance against the company. He claimed that he had been unjustifiably dismissed and that he was owed a considerable amount by way of wage arrears. The company defended the grievance and pursued a breach of contract claim against Mr Rockell, seeking damages for losses it says it sustained as a result of Mr Rockell's default.

[2] The Employment Relations Authority (the Authority) upheld the grievance, but found that Mr Rockell had wholly contributed to the situation he found himself

in.[1] The Authority determined that Mr Rockell was due outstanding wages, by way of annual leave, weekends worked and statutory holidays.[2] The company's claim for damages was dismissed on the basis that it had not been sufficiently made out.[3]

[3] The company challenges two aspects of the Authority's determination, namely the award of wage arrears totalling $42,793.12 and the dismissal of the plaintiff's claim for damages for breach of contract. There is no challenge to the finding that Mr Rockell's dismissal was unjustified. Nor is Mr Rockell challenging the finding that he contributed 100 per cent to the losses he sustained. That means that the two issues before the Court, and in relation to which evidence was heard, are the extent to which Mr Rockell is entitled to wage arrears and the plaintiff's claim for damages.

[4] In order to assess the merits of these claims it is necessary to understand some of the background to the relationship between the parties and how events unfolded during Mr Rockell's time as farm manager.

The facts

[5] At the relevant time Mr McKenzie lived in Hong Kong, although he travelled to Kerikeri from time to time and visited the farm. It is apparent that the farm had enjoyed a productive phase during a previous farm manager's time on it, although there were issues with the performance of the farm manager who held the role just prior to Mr Rockell's appointment. That relationship had come to an end after about 12 months. It was around this time that Mr McKenzie met with Mr Rockell and discussed the possibility of him taking on the role. There is a dispute as to what was said and agreed to during the course of this meeting. I return to this issue later. What is clear is that Mr Rockell agreed to become the farm's manager and to operate it as an organic dairy farm. No employment agreement was signed.

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[1] *Rockell v Rainbow Falls Organic Farm Ltd* [2013] NZERA Auckland 242 at [13]-[36] [Authority determination].
[2] At [47]-[51].
[3] At [37]-[46].

[6] Mr McKenzie and Mr Rockell got on well. When Mr McKenzie travelled to New Zealand he would stay in a cottage on the farm. While there were issues with the extent to which Mr McKenzie could be involved in the farm's operations, it is clear that he took the opportunity to walk around the farm when he was staying there and that he discussed various issues with Mr Rockell during this time. The pair also communicated via email from time to time.

[7] The cow herd was horned, in conformance with Mr McKenzie's expressed wishes. The herd that was previously run on the farm had not been. Mr Rockell tipped, or lopped off, the horns of several cows and it was this that ultimately gave rise to his dismissal. While I do not need to dwell on the circumstances surrounding the dismissal, given the limited focus of the challenge, it is clear that Mr Rockell had no idea that Mr McKenzie had any concerns about a potential breach of contract at the time he was dismissed. Rather, it is apparent that the two had a civil conversation and Mr Rockell was given around seven weeks' notice.

[8] Issues arose in respect of Mr Rockell's final pay. He met with Mr McKenzie and Ms Janette Gill, a client manager at the company's accounting firm, sometime towards the end of May or early June 2011. Ms Gill had been the primary point of contact for Mr Rockell in terms of the farm accounts. In particular, Mr Rockell had provided her with any invoices relating to work carried out by contractors on the farm and she arranged payments and kept records in relation to such matters. It is common ground that on occasion, when Mr Rockell was away, he would arrange for a relief milker to milk the cows. This was, of course, only necessary during the milking season. Mr Rockell would forward the invoices to Ms Gill and she would arrange the necessary payments.

[9] Ms Gill undertook the process of trying to calculate Mr Rockell's outstanding leave with Mr McKenzie. This process was informed by the records which Ms Gill maintained based on information Mr Rockell supplied her with, relief milker invoices and other records. Ms Gill prepared a number of documents setting out the calculations and these were presented to Mr Rockell at the meeting with a view to reaching an agreement as to final quantum. The annual leave calculation was based on an entitlement of 16 weeks annual leave from November 2006 to May 2011. Ms

Gill's records reflected that Mr Rockell had taken five weeks annual leave during this period. Mr McKenzie did not accept that this accurately reflected the true position in relation to Mr Rockell's leave. Rather he believed that Mr Rockell had taken his annual leave during times when the cows had dried off or work demands otherwise permitted. Mr McKenzie decided to convert the seven week notice period into annual leave, leaving four weeks of leave remaining, which Mr McKenzie also considered to be doubtful.

[10] Mr McKenzie was of the view that Mr Rockell had stopped work on the farm two days after he was given notice and did not work out the notice period. This concern was reinforced by the fact that Mr Rockell hired a relief milker from 10 April to 6 May 2011. From 6 May, the cows had dried off and there was no milking to do. Mr McKenzie did not consider that the company ought to be liable to pay for the costs associated with the relief milker (which amounted to $5,455.03). This figure was accordingly shown as a deduction in the calculations presented to Mr Rockell for his consideration.

[11] While Mr Rockell would otherwise have received a (gross) payment of $4,583.00 by way of salary for May 2011, that amount was not reflected in the final calculations. This figure was omitted from the plaintiff's calculations on the basis that Mr Rockell had not worked on the farm during this time (according to Mr McKenzie). I pause to note that Mr Rockell says that he spent the seven week period busily working elsewhere on the farm, although not doing the milking. While it remained unclear precisely what activities he was undertaking during this time, and he undoubtedly approached his tasks with reduced enthusiasm, I am not prepared to conclude, based on the evidence before the Court, that he effectively stopped working from 10 April, as Mr McKenzie asserts.

[12] Ms Gill also produced a document entitled "Unpaid Weekends". Based on the information that Mr Rockell provided, it appeared that he was entitled to 103 weekends off, for the period 1 November 2006 to 31 May 2011. That would mean that he had only taken 64 weekends off, including during the dry seasons. Mr McKenzie did not believe that the figures reflected the reality of the situation.

[13] No final agreement was reached at the meeting and no payment was made to Mr Rockell. He then pursued a grievance in the Authority.

[14] Mr McKenzie took steps to employ a new farm manager. Mr Matthew Minoprio took on the role on an interim basis. He and Mr McKenzie walked around the farm and both professed to being shocked by the run down state of the farm and the farming equipment. Numerous photographs were taken which were said to show the ill-maintained state of the fencing, cow shed, troughs, milking equipment, and the farm ute and tractor. Photographs were also taken of gorse infestations which Mr McKenzie contended ought to have been controlled during Mr Rockell's time as farm manager.

[15] Sometime after Mr Rockell had filed his statement of problem in the Authority claiming wage arrears and unjustified dismissal, a counter-claim for breach of contract was filed. The allegedly parlous state of the farm and its equipment underlies the plaintiff's claim of breach of contract. The claim alleged that Mr Rockell had breached the terms of his employment agreement by failing to properly maintain the farm and sought damages for the losses incurred as a result.

Analysis

[16] The claim for wage arrears and the claim for breach of contract involve an analysis of the terms of Mr Rockell's employment agreement. The breach of contract claim raises additional issues, which I return to later.

[17] The plaintiff seeks to rely on the terms of an employment agreement entered into with Mr Rockell's predecessor, and which Mr McKenzie says he discussed with Mr Rockell on the deck to the farm house prior to his appointment. While he says that he was aware of the importance of a written agreement because of difficulties that had arisen with the previous farm manager, the terms of Mr Rockell's employment agreement were never reduced to writing. Mr McKenzie says that that was because Mr Rockell refused to sign an agreement, saying that it was not necessary. Mr Rockell agrees that he said that a written agreement was unnecessary but disputes that he refused to sign one. It is more likely than not that the general

terms of employment were discussed by way of reference to what was described as a 'standard form' agreement and that Mr Rockell indicated that he did not consider that a written agreement was necessary. It is evident that Mr McKenzie was content to leave it on this basis notwithstanding the lessons he says he had learnt about the importance of an agreement arising out of the departure of the previous manager, and notwithstanding the legal obligation to have a written agreement.

[18] I am not satisfied, based on the evidence before the Court, that there was agreement as to the detail of the terms and conditions set out in the documentation relied on by the plaintiff. However, there was some meeting of the minds. In evidence, Mr Rockell agreed to various propositions put to him in relation to what he accepted were terms of his employment. He agreed that gorse control was part of his employment agreement and that there was a target of 40,000 kilograms of milk solids for the farm. He also accepted that there had been agreement as to hours of work and the way in which time off was to be dealt with. I set out the scope of that agreement below.

Wage arrears

[19] Mr Rockell's claim for wage arrears was brought pursuant to s 131 of the Employment Relations Act 2000 (the Act). He claims[4] that, during the five year period he was employed by the plaintiff, he:

- Worked a full day on every public holiday, even when the cows were dry (equating to 52 days);
- Accrued 10 weeks annual leave, having had no annual leave in the first half of May 2007, only two weeks annual leave in 2008, 2009 and 2010, and no annual leave in 2009;
- Worked 68 weekends which he was otherwise entitled to have off.

[20] The essence of the defendant's case is that he worked on each of the claimed days, consistently with the plaintiff's records.

[4] Based on a daily rate of $150.68 per day.

[21] The Authority held that the plaintiff was responsible for the maintenance of wage and holiday records and had the onus of showing that holidays and annual leave had been taken. It determined that the plaintiff had not discharged this onus and that accordingly the defendant was entitled to the wage arrears claimed.[5] The Authority's approach effectively hinged on a strict application of s 132 of the Act.[6] That provision states that:

> (1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that –
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> (a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
>
> (b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.
>
> (2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of –
>
> (a) the wages actually paid to the employee:
>
> (b) the hours, days, and time worked by the employee.
>
> …

[22] While s 132(1) relates to circumstances in which an employee claims to be prejudiced by an employer's failure to keep or produce records, somewhat ironically Mr Rockell claims that the employer's records *do* accurately reflect the leave he took during the five year period he worked as farm manager and that they ought to be relied on without further inquiry.

[23] It is apparent that s 132 is aimed at ensuring that employees are not prejudiced by an employer's failure to maintain proper records. The application of this provision is affected in this case by the reality of the relationship between the parties, involving a largely autonomous farm manager and a largely absentee employer, and the relevant contractual framework the parties operated under.

[24] Mr Quarrie, counsel for the defendant, submits that the onus is on the plaintiff to prove that the defendant's claims are incorrect and, if it cannot, the claims

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[5] Authority determination, above n 1, at [49]-[51].

[6] See also s 83 Holidays Act 2003 which is to similar effect in relation to holiday and leave entitlements.

must be taken as established. This submission overlooks the permissive, as opposed to mandatory, wording of s 132(2) ("the [Court] may … accept as proved"). It also overlooks the particular circumstances of this case and some key aspects of the evidence which do not favour the defendant.

[25] Mr Rockell agreed in cross examination that his (unwritten) employment agreement included the following provision in relation to leave:

> **HOURS OF WORK**
>
> (a) The usual hours of work for the position of Farm Manager are such hours each week that are necessary for the effective discharge of the employee's responsibilities, worked between 5am to 7pm Saturday to Friday. The hours may be varied by agreement between the employer and the employee to suit particular needs or circumstances. …
>
> (b) …
>
> (c) The employee is entitled to one weekend off in every two weeks worked. *If required by the employer* and agreed to by the employee, *the employee works on a weekend/s that he or she would normally be entitled to have off, that weekend may be carried over and taken in lieu at a later date mutually agreed* between the employer and employee. If requested by the employee and agreed to by the employer, the employee may take the weekend off in advance. *Holidays and rest days are to be taken wherever possible. Any untaken weekend relief days and/or holidays will be paid to the employee if there are valid reasons for the employee not taking such holidays*.
>
> (emphasis added)

[26] The evidence established that there was never any requirement imposed by the plaintiff for Mr Rockell to work on a weekend he would normally be entitled to have off. Mr Rockell was in a management position and ran the farm on a day-to-day basis. He confirmed in cross examination that he organised his own leave around his work commitments:

> Q. So effectively what it is saying is when it is quiet on the farm, when the cows are dried off or before the milking starts or whatever but when the quiet periods – you take your holidays and rest days. And you'd agree with that?
>
> A. Correct.
>
> …

> Q. You were effectively in complete control of the days and hours that you worked?
>
> A. Yes.

[27] It is clear that Mr McKenzie relied on Mr Rockell to take responsibility for managing his own leave and keeping track of his entitlements. This was based on the fact that Mr Rockell was the only person in a position to know what days were worked or not worked, having regard to his role as sole farm manager and Mr McKenzie's absence overseas. It is true that a system could have been put in place to require Mr Rockell to present regular records to either Mr McKenzie or Ms Gill. However it is evident that the parties had agreed to deal with leave on a particular (take it when the farming commitments allow) basis, that Mr McKenzie believed that this is what had been occurring, and that Mr Rockell had taken the leave that he was entitled to.

[28] The defendant submits that the present case is analogous with *Glenmavis Farm Partnership (2007) v Todd*.[7] There it was held that the (farm manager) employee could not be deemed to have been delegated the responsibility to keep holiday and leave records as there was no job description outlining this as part of his managerial responsibilities. Further, the employer had appointed a business consultant to maintain the wage and time records based on information supplied by the employee. Chief Judge Colgan observed that even if the employee had been deficient in his reporting obligations then "this was properly a matter for the employer to have taken up with him but it did not do so."[8]

[29] I agree with Mr Quarrie that there are some similarities with the present case. However, even if it is accepted that the realities of the parties' arrangements did not have the effect of shifting the record keeping responsibilities, that is not the end of the enquiry. That is because the engagement of s 132 of the Act (which is in similar, though not identical, terms to s 83(4) of the Holidays Act 2003) does not mean that the Authority or Court must accept as proved statements made by the employee about the wages actually paid to the employee and about the hours, days, and time worked by the employee. That is made clear by the reference to "may", not "must",

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[7] *Glenmavis Farm Partnership (2007) v Todd* [2012] NZEmpC 137, (2012) 10 NZELR 388.
[8] At [40].

in s 132(2). In the present case there is evidence that tells against the assertions that Mr Rockell makes as to his leave entitlements.

[30] I was not at all drawn to the defendant's evidence as to when he worked. His evidence was less than straightforward and it was established that it was wrong in material respects. During the course of cross examination it was put to Mr Rockell that he had attended squash tournaments in July 2009 and May 2010 and that he could not have worked those weekends:

> Q. So you can't have been working that weekend could you?
>
> A. No.

[31] The following exchange also took place:

> Q. … my suggestion to you is that you didn't need to tell [Ms Gill] because you agreed you would take holidays and rest days whenever possible and you did. That's right isn't it?
>
> A. Absolutely.
>
> Q. And so [Ms Gill's] records in relation to weekends not taken are completely unreliable because you haven't given her any information about that in that year.
>
> A. Correct.

[32] It is plain that Ms Gill's records do not reflect an accurate summary of the days Mr Rockell worked and did not work. They do record the days that a relief milker was brought in and paid for. As I have already observed, a relief milker was not required during the dry season. The parties had agreed (in the context of the particular work environment and the sole charge nature of Mr Rockell's position) as to when leave would be taken and the process that he was to follow to obtain his employer's approval to take leave at another time if it was not possible to take leave as provided.

[33] It is revealing that Mr Rockell deferred raising the issue of outstanding wage and leave entitlements until a very late stage. It is simply not credible that, if he had leave owing (particularly significant quantities of leave), he would not have raised it in a timely manner (consistently with his obligations as an employee to be

responsive and communicative and having regard to his role as farm manager) rather than let his employer's liability burgeon to such an extent. He got on well with Mr McKenzie and, as he accepted in evidence, there was never an issue with payment for a relief milker or additional support or assistance if that was required, to enable him to have time off. Further, it is difficult to reconcile Mr Rockell's claim that he worked as unremittingly as he did with the state of the farm at the time of his departure, even having regard to the nature of his role and the fact that it was an organic farm.

[34] Mr Quarrie also referred to *Napier Aero Club Inc v Tayler*[9] and *Roche v Urgent Medical Services Home Care Ltd.*[10] In *Napier Aero,* Chief Judge Goddard referred to an obligation under s 12(2) of the Holidays Act 1981 for the employer to confer with the employee for the purpose of discussing the employer's work requirements and the employee's preferences in terms of rest and recreation. Section 12(2) of the 1981 Act provided that:

> Except where … the worker's contract of service otherwise provides, the time at which any annual holiday to which the worker has become entitled may be taken shall be fixed by his employer after consultation with the worker, and, in fixing that time, work requirements and the opportunities for rest and recreation available to the worker shall be taken into account.

[35] As this duty was imposed on the employer, Chief Judge Goddard considered that "the employee cannot be regarded as being in default or as attempting to profit from his own default". He went on to suggest that given the purpose of the statutory scheme (to provide employees with leave entitlements), it "may not be enough for employers to leave to the employees to decide when they will take their holidays" as, on that basis, "holidays might not be taken and the employer might thus obtain the benefit of the employee's work without having to provide a holiday".[11] He concluded by noting that "however undesirable stale claims in respect of untaken holidays may seem, there is no room for applying equity and good conscience to defeat them."[12] These observations imply a positive statutory obligation upon employers to ensure that leave is taken.

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[9] *Napier Aero Club Inc v Tayler* [1998] 1 ERNZ 241 (EmpC) at 246.
[10] *Roche v Urgent Medical Services Home Care Ltd* [1999] 2 ERNZ 788 (EmpC).
[11] *Napier Aero*, above n 9, at 245.
[12] At 247.

[36] This latter point was subsequently reinforced in *Roche.* There the Court held that there was an onus on employers to ensure that annual holidays were taken, but that this obligation had effectively been complied with in the circumstances of that case. In this regard the employee had chosen to work on the first and last days of his annual holidays and this was a decision within his control.[13] It was otherwise found that the employee had had no choice but to work public holidays and was entitled to relief in that regard.[14] In *Napier Aero*, the Court found that no concrete steps were taken to ensure that the employee could take leave, and that the employer must have been aware that he had not taken all of his holidays. This is not the position in the present case.

[37] Both *Napier Aero* and *Roche* were decided under the Holidays Act 1981. It is notable that s 18(3) of the Holidays Act 2003 is crafted slightly differently to the former s 12(2). Section 18(3) simply requires both parties to "agree" as to when leave shall be taken, as opposed to being "fixed" by the employer following consultation with the employee concerned. This may be seen as reflective of the broader reciprocal obligations imposed on employers and employees, and statutorily recognised in the Employment Relations Act, to be responsive, communicative and to act in good faith towards one another. Further s 18(3) applies in respect of annual holiday entitlements, and not in respect of additional contractual entitlements, such as an entitlement to weekends.

[38] In the present case the plaintiff reasonably assumed that Mr Rockell was taking his leave as and when he could, consistent with the terms of his employment agreement and in the absence of any indication from Mr Rockell to the contrary. He was expressly authorised to secure additional support and assistance, as required, and took up this option on occasion.

[39] Mr Rockell was unable to say that he had worked on the weekends or statutory holidays at issue, answering the questions put to him on this topic in a less then direct manner. Mr McKenzie's evidence, which I accept, was that Mr Rockell was never required to work on any weekend that he would normally be entitled to

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[13] *Roche*, above n 10, at 803.
[14] At 802.

have off and that he was never informed that Mr Rockell had worked on a statutory holiday. No "valid reasons", in terms of the employment agreement, were ever identified for not taking the holidays Mr Rockell was entitled to but which he now says he did not take. Mr Rockell accepted that he had attended various other functions, such as squash tournaments. He was also a keen fisherman, kept a boat at the property, and there was evidence that Mr Rockell used his boat on occasion when conditions were favourable. Even having regard to the challenges that Mr Rockell no doubt faced as a farm manager, I am satisfied, on the balance of probabilities, that he took time off in accordance with his employment agreement.

[40] I pause to note that even if I had accepted that Mr Rockell did work public holidays and failed to take annual leave or take days in lieu as claimed (which I do not), it is clear that that election was entirely his own. There was no expectation by the employer that he would do so, quite the reverse. I do not accept that the employer had an obligation, in the particular circumstances of this case, to ensure that Mr Rockell was taking the leave he had agreed to and which he could reasonably be assumed to be taking, consistently with the parties' earlier discussions and the way in which their agreement as to leave arrangements had been formulated. Such an approach would sit uncomfortably with his obligations, as an employee and particularly in his position as sole farm manager reporting to Mr McKenzie who was resident overseas.

[41] I see some force in Judge Finnigan's observations in *Marine Helicopters Ltd v Stevenson* in the particular context of this case:[15]

> It has not been by any failing of the employer in its duties towards him, either contractual or statutory, that Mr Stevenson worked on public or annual holidays. From the fact that he did so I see no obligation on the employer, imposed either by the Holidays Act 1981 or by the employment contract, to pay to Mr Stevenson now that the employment contract is at an end, sums representing days off which were due to him but which he chose not to take. ... The absence of holidays was contractual and his own choice. There have been no deficiencies in the payments he has received, for days when he could have had holidays, but worked.

[15] *Marine Helicopters Ltd v Stevenson* [1996] 1 ERNZ 472 (EmpC) at 496-497. *Stevenson* was also decided under s 12 of the Holidays Act 1981 and was distinguished in *Roche* and *Napier Aero*.

Breach of contract

[42] The plaintiff claims that Mr Rockell breached the terms of his employment agreement by failing to attend to "the most basic work required of his employment", leaving the farm in a "seriously run down state" requiring substantial rectification, and that he did not carry out his employment obligations to the standard reasonably expected of an experienced farm manager. The alleged breaches were summarised by counsel in closing as the failure to keep the weeds and gorse on the property under control, the failure to maintain the fences, and the failure to maintain milk production to 40,000 kg. The plaintiff claims damages totalling between $195,434 and $454,418, comprising loss of production and the costs of repairing fences and clearing gorse.

[43] There are a number of difficulties with the plaintiff's claim, not the least being the lack of certainty about the terms of the parties' agreement and the hands-off approach adopted by the plaintiff to dealing with the accruing difficulties and falling productivity, which it now says that Mr Rockell was responsible for but which it failed to address at the time.

[44] Mr McKenzie asserted that the terms of a 'standard form' farm contract applied. This was not wholly accepted by Mr Rockell. While he accepted that there was an obligation to take reasonable steps to control the gorse and an 'aspirational' target relating to milk production, he did not otherwise accept that the job description that Mr McKenzie referred to formed a part of his contract. As I have said, no agreement was signed and, while it is evident that there was some discussion about the terms of the agreement, there is a distinct lack of clarity in relation to the details and scope of Mr Rockell's contractual obligations.

[45] Much was made of the fall off in milk production during Mr Rockell's time as farm manager and the inferences that could be drawn from this. Countervailing evidence was given as to the likely effects of a drought and a lack of fertiliser, but in the final analysis I do not accept that a decline in production, below a level that was expressed in aspirational rather than mandatory terms, constituted a breach of Mr Rockell's contractual obligations.

[46] Even if the full 'standard form' agreement and job description did apply (which I do not accept), additional difficulties would have arisen. Clause 19 provided that:

> Good communication between the employer and employee is essential for this agreement to be carried out efficiently. The employer and employee shall meet and review farm management procedures and set farm policy on a monthly basis or at any time required by a Farm Consultant and/or the employer.

[47] There is nothing to suggest that any such monthly reviews were undertaken, although the clause is clearly designed to identify and address farm management issues at an early stage.

[48] The agreement specifically provides for the circumstances in which the costs associated with damage to property caused by the employee could be recovered (see, for example, cl 11(d) – "the employee shall be responsible for any damage to the house and related buildings during the course of the employee's occupation of the house" and cl 11(g) – "If the employee fails to leave the house in a condition as outlined in clause 11(f), the employer shall be entitled to make a rateable deduction from the money due to the employee for the cleaning and/or repair of the house"). The agreement makes no provision for liability in the event the employee fails to leave the property more generally in a damaged state.

[49] The agreement, most notably Appendix One (Schedule of Work to be Performed), emphasised teamwork and the expectation that the profit resulting from the "aim" of 40,000 kgs of milk solids would be "achieved through successful teamwork of all involved with the farm".[16] However, it is evident that meeting the 40,000 kg "aim" was not the primary task expected of the employee. Rather the agreement made it clear that the "primary task" was to maintain all cows and calves consistently at a healthy level.[17]

[50] In so far as farm maintenance was concerned, the stated obligation was to:[18]

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[16] Clause 2.
[17] Clause 2(a).
[18] Clause 2(d).

> undertake general farm repairs and maintenance *necessary* for the smooth and safe running of the farm.

[51] Gorse removal and control was specifically referred to in cl 2(f), which provided that:

> The Farm Manager's salary has been set at a level to compensate for the regular and consistent control and removal of gorse to a mutually agreed programme with the Employer, all visible areas taking priority…

[52] No mutually agreed programme had been discussed, let alone finalised. At best, gorse was the topic of sporadic conversation during Mr McKenzie's visits. Mr McKenzie said that he would walk around the farm with Mr Rockell and they would talk about where the gorse appeared to be a problem, he would ask what Mr Rockell was doing to address it, and Mr Rockell would tell him. There is nothing to suggest that Mr McKenzie advised Mr Rockell that he believed that he was slipping beneath the standards set by the agreement in relation to gorse removal, productivity, farm maintenance or more generally.

[53] Mr McKenzie made the point that he needed to trust Mr Rockell to undertake the necessary maintenance work given that he spent a considerable amount of time overseas. That may be so, but it does not explain why, if the farm was deteriorating in the way he now says it was and he was concerned about it, he did not seriously raise his concerns with Mr Rockell during his site visits. The same point can be made in relation to production levels. This would have been readily apparent from the financial data over the course of the five year period and did not require any physical presence in New Zealand.

[54] The plaintiff's claim essentially rests on ongoing breaches by the defendant throughout the course of the employment relationship. It is well accepted that the law does not allow a plaintiff to recover damages to compensate for loss which would not have been suffered if he or she had taken reasonable steps to mitigate the loss.[19] In the employment context this is reinforced by the mutual obligations of good faith, and the obligation to be responsive and communicative, that rests on both parties.

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[19] John Burrows, Jeremy Finn, and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [21.2.4(a)].

[55] Despite the breaches that Mr McKenzie says were being committed during the course of a five year period these were never brought to Mr Rockell's attention. Rather, Mr Rockell remained in the dark as to the extent of the concerns that Mr McKenzie now says he had and the claimed damage that had continued to accrue. The letter of dismissal made no mention of any perceived default on Mr Rockell's behalf of the sort now asserted. Indeed, he was thanked for the work done over the last two seasons.

Can the plaintiff pursue a breach of contract claim?

[56] It was submitted on behalf of the defendant that the plaintiff was not entitled to bring a claim for breach of contract against Mr Rockell in the circumstances, referring to the obiter observations in *George v Auckland Council* in support.[20]

[57] Mr Quarrie submitted that there was no term, express or implied, in the employment agreement between the parties allowing the plaintiff to hold Mr Rockell liable in contract for claimed loss as a result of poor performance. There is some attraction to his argument that if a reasonable bystander had asked the parties at the outset of their employment relationship: "What happens if the employee does not perform his/her duties to a satisfactory standard?" the answer would be: "disciplinary action which could result in dismissal", rather than "the employer could undertake disciplinary action which could result in dismissal and also sue the employee for damages for the losses associated with the poor performance".

[58] The 'double-whammy' effect of dismissal plus a damages claim, both arising out of the same poor performance committed during the course of the employment relationship, sits uncomfortably with the statutory mechanisms for resolving employment relationship issues and may well have a chilling effect on employees considering a personal grievance, concerned not to prompt a retaliatory damages claim in response. Mr Quarrie drew a distinction between those in an employment relationship and independent contractors, where an action for breach of contract for alleged poor performance giving rise to losses may be appropriate. The point advanced by Mr Quarrie in the present case may find support in the terms of the

[20] *George v Auckland Council* [2013] NZEmpC 179 at [147]-[150].

agreement that Mr McKenzie relied on, which details a procedure for the settlement of "*all* employment relationship problems" and includes no reference to the resolution of any such problems via a claim for breach of contract. Rather, the identified mechanisms are restricted to the personal grievance procedures referred to.

[59] I do not need to reach a concluded view on the issue because, even if this potential stumbling block did not exist, the plaintiff's claim fails on the facts.

Conclusion

[60] The plaintiff's challenge in relation to the Authority's determination that it owed the defendant wage arrears succeeds. I am not satisfied that the plaintiff worked on the public holidays and weekends claimed, or that he has the outstanding annual leave entitlements he asserts.

[61] I do not accept the plaintiff's claim that Mr Rockell was not entitled to be paid during his notice period. He is accordingly entitled to a gross payment of $4583.00, together with interest.[21]

[62] I do not accept the plaintiff's proposition that Mr Rockell was liable to reimburse the costs associated with a relief milker during his notice period.

[63] The plaintiff's challenge to the Authority's determination relating to its claim for breach of contract is dismissed.

[64] The Authority's determination is set aside and this judgment stands in its place pursuant to s 183(2) of the Act.

[65] Both parties asked that costs be reserved. It may be an appropriate case for costs to lie where they fall. However, if the parties wish to pursue the issue of costs, the plaintiff will have 30 days to file and serve any memorandum and supporting

[21] Pursuant to cl 14 of Sch 3 to the Act.

material with the defendant having an additional 20 days, and any reply within a further 10 days.

Christina Inglis
Judge

Judgment signed at 12 noon on 29 July 2014